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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 43621**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR 2013-2326**
v.	)	
	)	
SHAWN NATHAN FISHER,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE JASON D. SCOTT
District Judge

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STATEMENT OF THE CASE

Nature of the Case

In *State v. Delling*, 152 Idaho 122 (2011), the Idaho Supreme Court reaffirmed its prior holdings and found that Idaho's statutory abolition of the insanity defense does not violate the Due Process Clause of the Fourteenth Amendment, or the Eighth Amendment's ban on cruel and unusual punishment. Mr. Delling petitioned the United States Supreme Court for Certiorari and, though the Court denied his request, Justice Breyer (joined by Justices Ginsburg and Sotomayor) dissented from the Court's decision stating, "I would grant the petition for certiorari to consider whether Idaho's modification of the insanity defense is consistent with the Fourteenth Amendment's Due Process Clause." *Delling v. Idaho,* 133 S.Ct. 504 (2012) (Breyer, J. dissenting from denial of Certiorari).

Shawn Fisher is schizophrenic and suffers paranoid delusions. His mental illness made him believe that he and his family were in danger from members of "starter network," who sent him threats through text messages and through his Xbox game console. While suffering from his delusions, Mr. Fisher drove toward his father and step-mother's residence to, in his mind, protect them from those unknown individuals whom he believed posed a danger. On his way there, he rammed his car into the car driven by Raymond Ellis, and then shot at Mr. Ellis as he drove by. Fortunately, the bullet did not strike Mr. Ellis; unfortunately, Mr. Fisher shot and killed Matthew Mohler-Kerns a short time late.

Based upon the fundamental common law tenet that "wrongdoing must be conscious to be criminal,"[1] nearly all jurisdictions within the United States recognize that those who commit criminal acts due to their mental illness, lack moral culpability and should neither be held

[1] *See Morissette v. U.S.*, 342 U.S. 246, 252 (1952).

criminally liable nor criminally punished, but instead should be subject to civil commitment in a mental institution. Idaho is one of just four States that currently strays from this basic premise.

Shawn Fisher pled guilty to an amended charge of Second Degree Murder and preserved his right to appeal the district court's denial of his motion to declare I.C. § 18-207, and the repeal of I.C. §§ 18-208 and 18-209, unconstitutional. Mr. Fisher asks this Court to reconsider and overrule its prior holdings and find that the Idaho legislature's abolition of the insanity defense violates the Due Process Clause of the Fourteenth Amendment, and the Eighth Amendment's ban on cruel and unusual punishment. Mr. Fisher asserts that the basic tenet that "wrongdoing must be conscious to be criminal," is so rooted in the traditions and conscience of the America people that it is fundamental to the concept of ordered liberty, and the failure to provide for an insanity defense, in some form, is unconstitutional. Additionally, Mr. Fisher asserts that the district court abused its discretion by imposing a fixed-life sentence upon him.

Statement of the Facts and Course of Proceedings

On February 8, 2013, Shawn Fisher sent a text message to his father stating "'I'm in a dark place …'." (PSI, p.349.)[2] Over the course of the next ten days, Mr. Fisher sent bizarre text messages and left disturbing voice mail messages for his father, step-mother, and co-workers. (PSI, pp.349-353, 376-381, 420-423.)

A little after 8 p.m. on February 18, 2013, Raymond Ellis was in his car about to leave his Boise apartment complex, when he realized that he left something in his apartment. (PSI, p.3.) When he returned, Mr. Ellis noticed that a car with its lights on in front of him was not moving. (PSI, p.3.) When Mr. Ellis began to drive away, he noticed that the driver of the other car,

[2] Citations to the Presentence Investigation Report and attached materials will include the page number associated with the electronic file containing those documents.

Shawn Fisher, appeared to be "jittery" and "nervous," and reached over to the passenger side floorboard to grab something before quickly driving to the back of the complex. (PSI, p.3.) While Mr. Ellis approached a nearby intersection, Mr. Fisher's car crashed into the back of his car. (PSI, p.3.) Mr. Fisher then shot at Mr. Ellis but missed him, before speeding off. (PSI, p.3.)

A few miles away and a short time later, Kevin McCann was driving home from work when he noticed a car in front him stopped in the middle of the road. (PSI, p.3.) Mr. McCann saw that the driver was slumped over so he stopped to render aid. (PSI, pp.3-4.) The driver of the stalled car, Matthew Mohler-Kerns, had been shot in the face and died as a result of his injuries. (PSI, p.4.)

At around the same time Mr. Ellis and Mr. McCann called 911, Ada County Deputies were dispatched to the home of Linda Fisher who was frightened because her step-son, Shawn Fisher, who had previously sent text messages to her, was at her front door. (PSI, p.4.) When officers arrived, they discovered Mr. Fisher's car with a broken front passenger-side window, but Mr. Fisher was nowhere to be found. (PSI, pp.4-5.) Officers began searching for Mr. Fisher. (PSI, p.5.)

Craig Stacey arrived at his home at around 9:00 p.m. and when he opened his driver's side door, Mr. Fisher walked up to him and said, "Hey I'm Shawn." (PSI, p.5.) Mr. Fisher then got into the front passenger seat. (PSI, p.5.) When Mr. Stacey told Mr. Fisher that he was not going anywhere, Mr. Fisher apologized, got out of the car, and started walking away. (PSI, p.5.) After Mr. Stacey told his wife what had occurred, he saw Mr. Fisher attempt to enter their home before eventually walking away. (PSI, p.5.)

Police officers found Mr. Fisher in the backyard of a daycare facility and had to use a police dog and tasers to subdue him. (PSI, p.5.) "Mr. Fisher was yelling irrational statements

and said, 'God bless you police officers,' and 'Jesus Christ will save you all.'" (PSI, p.5.) A handgun, later determined to have been used in both shootings, was found in the play structure that Mr. Fisher was located in. (PSI, p.5.)

After being taken to the hospital, Mr. Fisher was transported to the Boise Police Department and agreed to speak with detectives, although he said that he "'did not remember much.'" (PSI, p.6.) "He stated that he was in pain but felt someone of a higher power was looking out for him tonight." (PSI, p.6.)

Mr. Fisher did not remember where he woke up or how he spent that day up until his encounter with the officers and the police dog. (PSI, p.6.) He told the officers that he had quit his job a week earlier because he felt a "'higher calling.'" (PSI, p.6.) Mr. Fisher said that he had been on his way to his father's house because "someone had warned him that they 'might take matters into their own hands and do damage to [his] family.'" (PSI, p.6.) He also told the officers that "someone had already warned him about 'doing damage' to his girlfriend and his family," and that he was checking up on them "to make sure they were 'safe, comfortable, and respected.'" (PSI, p.6.)

Mr. Fisher described the people who threatened his family as a "starter network" with around 50 members, and that he learned of the network through his co-worker, Jessie, who he also knew as JZ, and who is about 7 feet tall and jealous of Mr. Fisher. (PSI, p.6.) JZ communicated these threats through Mr. Fisher's phone and Xbox game console. (PSI, pp.6-7.) Mr. Fisher could not identify anything specific but JZ made "vague threats." (PSI, p.7.) He claimed that JZ "had been raping him for years and that he did not know it." (PSI, p.8.)

Mr. Fisher claimed that a group related to the Microsoft Corporation had threatened him as well. (PSI, p.7.) He stated that he used his Xbox to communicate with people all over the

world that "'Jesus is coming. Love thy neighbor,'" and said that the information stored on Xboxes has been stored on other devices for hundreds and hundreds of years, and that this information was a "'call out.'" (PSI, p.7.)

Mr. Fisher told the detectives that he did not know any of the other people in the "starter network," but that he had been shot at once after work. (PSI, p.7.) He said that his dad sent him a text message the previous day which Mr. Fisher believed was a "'call out'" telling him to be careful. (PSI, p.7.) He went to his father's house believing that everyone close to him was in danger. (PSI, p.8.) When he arrived, he saw Linda and another woman[3] he did not know, said "hi" to Linda, and she turned and walked away. (PSI, pp.7-8.)

Mr. Fisher said that he has out-of-body experiences that reveal events that have happened in the same location in the past. (PSI, p.8.) After providing the detectives with his address, he told them "he didn't expect them to believe in ghosts, but said the home had a 'dark feeling and presence to it' that upset him to the core." (PSI, p.8.) Mr. Fisher stated that "he has cried and the dark energy showed him how far it would go to destroy each other." (PSI, p.8.)

When the detectives told Mr. Fisher that they suspected he had shot someone the previous night, Mr. Fisher stated, "'That would be hard to take.'" (PSI, p.9.) Mr. Fisher denied that he had shot anyone, but admitted that he sometimes suffers from blackouts. (PSI, pp.9-11.) He acknowledged, "'If I have taken someone's life, that is heinous.'" (PSI, p.10.) The interview ended when Mr. Fisher asked to speak with a lawyer. (PSI, p.11.)

An Ada County grand jury issued an Indictment charging Mr. Fisher with first degree murder, aggravated battery, aggravated assault, felony possession of a controlled substance, use of a firearm during the commission of the murder and the aggravated assault, misdemeanor

[3] A friend of Ms. Fisher's, Jocelyne Collins, was visiting when Mr. Fisher arrived. (PSI, p.4.)

possession of a controlled substance and resisting or obstructing an officer. (R., pp.39-42.) Ten days later, counsel for Mr. Fisher filed a motion requesting the court order an evaluation to determine Mr. Fisher's competence to proceed, which the district court granted. (R., pp.60-61, 65-66.) After Mr. Fisher was initially found competent to proceed, the parties stipulated to have Mr. Fisher's competency re-evaluated. (R., pp.67, 74-75.)

Believing that he possessed special powers and that he was a relative of Jesus, Mr. Fisher repeatedly expressed his desire to have his case moved to Texas so he could be executed and resurrected, as he had been in the past. (Exh., pp.96-118; *see also* PSI, pp.742-862 (transcript of competency hearing)[4].) Dr. Craig Beaver, Ph.D., opined that Mr. Fisher's mental illness "would be best described as … schizoaffective disorder, bipolar type" or alternatively, "schizophrenia, paranoid type" (Exh., p.101), while Dr. Camille LaCroix, MD, diagnosed Mr. Fisher with "Schizophrenia, Paranoid Type" (Exh., p.113). Both opined that Mr. Fisher suffers paranoid delusions as a result of his mental illness.[5] (Exh, pp.96-118; *see also* PSI, pp.742-862 (transcript of competency hearing).)[6] The district court found that Mr. Fisher was unable to assist in his defense. (R., pp.125-140.) Fifteen months later, after a period of being involuntarily treated

[4] The transcript of the competency hearing was included as part of the presentence investigation materials and was not ordered as a separate transcript in this appeal. The exhibits submitted during that hearing are included in the appellate record in a 118-page electronic file and will be cited herein as "Exh."

[5] Mr. Fisher told the officers that he was taking Lithium, another anti-depressant, and "research chemicals," he tested positive for "bath salts" (synthetic cannabinoids), and officers found a large amount of synthetic cannabinoids as well as prescription drugs in his apartment. (PSI, pp.10-11, 106-109.) While Mr. Fisher's use of synthetic cannabinoids "contributed significantly" to his conduct, his schizophrenia exists independently of his drug use, and his delusions were present before, and have persisted long after, he stopped taking non-prescribed substances. (Tr. 9/30/15, p.89, L.23 – p.90, L.22; PSI, pp.763, 802, 812-813, 822-823.)

[6] During the sentencing hearing, the State acknowledged that their expert, Dr. Michael Estess, also diagnosed Mr. Fisher as schizophrenic. (Tr. 9/30/15, p.102. Ls.13-17.)

with anti-psychotic medications, Mr. Fisher's competence was deemed restored. (R., p.217; PSI, pp.863-904.)

On his behalf, Mr. Fisher's trial counsel filed a "Motion to Declare I.C. § 18-207 and Repeal of I.C. §§ 18-208 - 209 Unconstitutional," and filed a memorandum in support of that motion. (R., pp.225-244.) Mr. Fisher argued, in part, that Idaho's repeal of the insanity defense in 1982 through the adoption of I.C. § 18-207, and through the repeal of I.C. §§ 18-208 - 209, violated his right to due process of law protected by the Fourteenth Amendment, and the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution.[7] (R., pp.229-236.) Recognizing that it was bound to follow *Delling*, the district court denied the motion.[8] (Tr. 6/17/15, p.27, L.22 – p.36, L.8.)

Mr. Fisher entered into a plea agreement with the State, pleading guilty to an amended charge of second degree murder, retaining the freedom to argue for what he believed to be an appropriate sentence; in exchange, the State agreed to dismiss the remaining charges and to ask

[7] Mr. Fisher also asserted that Idaho's abolition of the death penalty violated his Fourteenth Amendment right to equal protection, his Fifth Amendment right to remain silent, his Sixth Amendment rights to present a defense and to effective assistance of counsel, as well as the equivalent provisions of the Idaho Constitution. (R., pp.225-244.) Mr. Fisher does not challenge the district court's findings on these issues.

[8] In denying Mr. Fisher's claim that the abolition of the insanity defense violates equal protection (an issue that was not raised and thus not addressed by the Idaho Supreme Court in *Delling*), the district court held that "treating those mentally ill persons who can form criminal intent different from those who cannot appears to me to be a rational and reasonable legislative classification." (Tr. 6/17/15, p.30, Ls.8-15.)

the court to impose a unified life sentence, with 25 years fixed. (R., pp.262-276; Tr. 7/1/15, p.5, L.4 – p.22, L.6.) Mr. Fisher's guilty plea was conditioned upon his right to challenge on appeal the district court's finding that Idaho's abolition of the death penalty was not unconstitutional. *Id.*

During the sentencing hearing, the State recommended that the district court impose a life sentence, with 25 years fixed, while counsel for Mr. Fisher requested the court impose a "10 fixed with a long period of indeterminate." (Tr. 9/30/15, p.93, L.24 – p.94, L.1; p.109, Ls.16-19.) The district court found that "Mr. Fisher's criminal conduct at the time of the offense charged was prompted in large degree at least by a delusion that someone was out to get him or his family," and that the victims "were caught in the cross hairs of a paranoid delusion." (Tr. 9/30/15, p.116, Ls.6-22.) The court further found that Mr. Fisher was "dealt a bad hand in life" and "has a very serious mental illness, schizophrenia … [a]nd that condition undoubtedly contributed in a very substantial way to what he did." (Tr. 9/30/15, p.118, Ls.11-19.) The district court ultimately executed a fixed life sentence stating that it could not find, "comfort-level wise," that Mr. Fisher does not pose a risk of future violence. (Tr. 9/30/15, p.119, L.18 – p.120, L.20.) Mr. Fisher filed a timely Notice of Appeal from his judgment of conviction. (R., pp.282-290.)

ISSUES

1. Should this Court find that Idaho's abolition of the insanity defense violates the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment?

2. Did the district court abuse its discretion by executing a fixed-life sentence based upon its uncertainty as to whether Mr. Fisher will be medication compliant in the future?

ARGUMENT

I.

This Court Should Find That Idaho's Abolition Of The Insanity Defense Violates The Due Process Clause Of The Fourteenth Amendment And The Eighth Amendment's Prohibition Against Cruel And Unusual Punishment

A. Introduction

Moral culpability, as a prerequisite to criminal liability and criminal punishment, is deeply rooted in American tradition. The insanity defense is the mechanism by which the moral culpability of a mentally ill person who commits an otherwise criminal act, is determined. Had Shawn Fisher committed these same acts, while suffering these same delusions, at any time from the founding of the United States, through the founding of Idaho, up until 1982, he could not be held criminally liable for his actions or be criminally punished, and would instead be subject to a civil commitment to a mental institution. In 1982, however, the Idaho legislature eliminated Mr. Fisher's ability to demonstrate that he was not morally culpable for his actions when it abolished the insanity defense.

Mr. Fisher acknowledges Idaho Supreme Court precedent uniformly holds that Idaho's abolition of the insanity defense does not violate any constitutional provisions. *See Delling, supra*; *see also State v. Searcy*, 118 Idaho 632 (1990); *State v. Card*, 121 Idaho 425 (1991). He asserts, however, that these cases have been wrongly decided. Mr. Fisher asks this Court to overrule its precedent and find that Idaho's abolition of the insanity defense violates the Due Process Clause of the Fourteenth Amendment, and the Eighth Amendment's prohibition against cruel and unusual punishment.

B. The Fundamental Ideal That Only Those Who Are Morally Culpable Can Be Held Criminally Liable Is Deeply Rooted In American History And Tradition, Continues To Be Recognized By 46 States, And Is Protected By The Due Process Clause Of The Fourteenth Amendment

The Fourteenth Amendment provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV. "[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition[.]'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. East Cleveland,* 431 U.S. 494, 503 (1977) (plurality opinion)). Those rights and liberties that are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed[,]'" cannot be infringed by state action. *Id.* (quoting *Palko v. Connecticut,* 302 U.S. 319, 325, 326 (1937)). Though the Supreme Court has generally considered historical tradition to be the benchmark for determining what is protected by the Due Process Clause of the Fourteenth Amendment (*see Glucksberg*, *supra*), the Court has also considered modern practice as a factor. *See Cooper v. Oklahoma*, 517 U.S. 348 (1996) (finding Oklahoma law requiring criminal defendants to prove their incompetence to stand trial by clear and convincing evidence violates the Due Process Clause of the Fourteenth Amendment, citing both historical practice and the fact that 46 states do not place such an onerous burden on the defendant).

Since this nation's founding, moral culpability has been the fundamental consideration in society's determination of whether a person can be held criminally liable for committing offenses against others[9] and, if so, what the proper criminal punishment should be. Moral

[9] The industrial revolution brought with it the creation of laws that the United States Supreme Court has described as "'public welfare offenses.' These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals[,]" and which do not require a person to act with any particular

culpability is not simply the intent to commit an act. "Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, [and] was congenial to an intense individualism and took deep and early root in American soil." *Morissette*, 342 U.S. at 251-52 (1952). The common law concept of *mens rea* was "broader than the mere intent to do a particular act," for "'[t]he basic premise[,] that for criminal liability some mens rea is required[,] is expressed by the Latin maxim *actus non facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty).'" *State v. McDougall*, 113 Idaho 900, 905-06 (Ct. App. 1988) (Burnett, J. specially concurring) (quoting 1 W. LAFAVE & A. SCOTT, SUSTANTIVE CRIMINAL LAW 297 (1986)).

At common law, a "lunatic" did not have an "evil-meaning mind" and thus could not commit a crime, as that person was not morally culpable. As Lord Blackstone observed, "In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself." 3 T. COOLEY, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, Book IV, p. 23 (3rd ED. Rev. 1884).

The moral culpability of the offender was relevant to all manner of heinous crimes. Lord Blackstone set forth the following definition of murder which explicitly recognizes the moral culpability of the offender:

> Murder is therefore now thus defined, or rather described, by Sir Edward Coke: "when a person of sound discretion unlawfully killeth any reasonable creature in being, and under this king's peace, with malice aforethought, either express or implied." The best way of examining the nature of this crime will be by considering the several branches of this definition.

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criminal intent in order to be held criminally liable. *See Morissette v. United States*, 342 U.S. 246, 255-60 (1952). Mr. Fisher takes no position as to whether or not due process requires the insanity defense to be available to those accused of violating such public welfare offense.

> First, it must be committed by a person of sound memory and discretion; *for lunatics or infants, as was formerly observed, are incapable of committing any crime: unless in such cases where they show a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil*.

3 T. COOLEY, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, Book IV, p. 194 (3rd ED. Rev. 1884) (emphasis in original) (internal footnote with citation omitted). Sir Matthew Hale also recognized that an insane person could not be held criminally liable if he committed his criminal act while suffering from his delusions:

> If a man be *non compos mentis*, and kill a man, he is to plead not guilty, and shall be acquitted …
>
> And the same law it is of a lunatic, that kills a man in the time of his lunacy; but if it be in those intervals, when he hath his understanding, then he is a felon[.]

1 HALE, HISTORY OF THE PLEAS OF THE CROWN, 434 (emphasis in original) (internal citations omitted).

The United States Supreme Court has recognized that the moral culpability of the offender as a prerequisite to criminal liability, is a founding principle of this country:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. *It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil*. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. *Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.*'

Morissette, 342 U.S. at 250-51 (emphasis added) (internal footnotes omitted). Thus, it is well-established that only those who are morally culpable for their actions can be subject to criminal liability, and imposing criminal liability upon someone who is not morally culpable due to their

mental illness violates the Due Process Clause of the Fourteenth Amendment.

C. The Fundamental Ideal That Only Those Who Are Morally Culpable Can Be Criminally Punished Is Both A Deeply Held Tradition And A Widespread Modern Practice, And Is Protected By The Eighth Amendment's Ban On Cruel And Unusual Punishment

Historically, moral culpability has always been a hallmark of determining whether criminal punishment can be imposed. The Eighth Amendment provides that "cruel and unusual punishments" shall not be inflicted. U.S. CONST. amend VIII. "[T]he Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted." *Ford v. Wainright*, 477 U.S. 399, 405 (1986) (citations omitted). While Eighth Amendment jurisprudence generally presumes criminal liability,[10] it was "well settled at common law that 'idiots,' together with 'lunatics,' were not subject to punishment for criminal acts committed under those incapacities." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002)). Thus, criminal punishment imposed upon someone who is not morally culpable for his or her actions violates the Eighth Amendment, for "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that inflicting criminal punishment upon someone for their "status" as being a drug addict violates the Eighth Amendment ban on cruel and unusual punishment).

In addition to historical considerations, courts are also guided by, but not beholden to,

[10] Even where criminal liability is found, the moral culpability of the offender is an important factor in determining the appropriate criminal punishment. *See Weems v. United States*, 217 U.S. 349, 367 (1910) (finding "[I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."); *see also See Miller v. Alabama*, 132 S.Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Enmund v. Florida*, 458 U.S. 782 (1982).

state practices when determining whether a practice violates the Eighth Amendment. *Kennedy v. Louisiana*, 544 U.S. 407, 421 (2008). The fact that 46 states provide for the insanity defense in some form (*see Clark v. Arizona*, 548 U.S. 735, 749-52 (2006)), supports the conclusion that the Eighth Amendment bars the infliction of criminal punishment upon those who are not morally culpable, due to their mental illness, for their otherwise criminal actions.

D. The Insanity Defense Protects Those Who, Due To Their Mental Illness, Are Not Morally Culpable For Their Otherwise Criminal Acts, By Shielding Them From Criminal Liability And Criminal Punishment

The insanity defense is both deeply rooted in American tradition, and is nearly universally used today, as the means by which moral culpability for those suffering mental illness at the time of their otherwise criminal acts has been determined. As Justice Breyer observed in his dissent from the Supreme Court's denial of certiorari in *Delling*,

> The law has long recognized that criminal punishment is not appropriate for those who, by reason of insanity, cannot tell right from wrong. See 4 W. Blackstone, Commentaries on the Laws of England 24–25 (1769); *M'Naghten's Case,* 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843). The insanity defense in nearly every State incorporates this principle. See *Clark v. Arizona,* 548 U.S. 735, 750–752, 126 S.Ct. 2709, 165 L.Ed.2d 842 (2006) (noting that all but four States recognize some version of the insanity defense); R. Bonnie, A. Coughlin, J. Jeffries, & P. Low, Criminal Law 604 (3d ed.2010) (same).

Delling v. Idaho, 133 S. Ct. 504 (2012) (Breyer, J. dissenting from denial of Certiorari).[11]

[11] In his dissenting opinion in *State v. Searcy*, 118 Idaho 632 (1990), the first case in which the Idaho Supreme Court upheld the abolition of the insanity defense in Idaho, Justice McDevitt traced the history of the insanity defense to as far back as the reign of Edward I (1272-1307), noting,

> During the reign of Edward II (1307-1321), there was a shift toward recognizing insanity as a complete defense, which was perfected by the time of the ascension of Edward III to the throne (1326-1327). The early form of the defense was a special verdict of madness, which entitled the defendant to acquittal by the King.

Searcy, 118 Idaho at 646 (McDevitt, J., dissenting) (citations omitted).

Idaho is one of just four jurisdictions in the United States where the insanity defense has been abolished by legislation. *Id.*; *see also* I.C. § 18-207; *State v. Delling*, 152 Idaho 211 (2011); *State v. Bethel*, 66 P.3d 840 (Kansas 2003); *State v. Herrera*, 895 P.2d 359 (Utah 1995); *State v. Korell*, 690 P.2d 993 (Mont. 1984).[12] While there are no uniform traditions describing either a singular test or the allocation of the burdens of production and persuasion, at its heart, the insanity defense, in whatever form is used, allows a trier of fact to determine whether the person accused of the crime was acting with an "evil-meaning mind." *See Clark*, 548 U.S. at 749-52 (describing variations in tests used and verdicts available in the 46 States that have some form of the insanity defense available). Abolishing the insanity defense eliminates the assurance that only those who are morally culpable may be subject to criminal liability and criminal punishment, and thus violates the Eighth and Fourteenth Amendments.

E. This Court Should Overrule Its Precedent And Find That The Abolition Of The Insanity Defense Violates The Due Process Clause Of The Fourteenth Amendment And The Eighth Amendment's Prohibition Against Cruel And Unusual Punishment

"'[T]he rule of stare decisis dictates that [the Idaho Supreme Court] follow [controlling precedent] unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice.'" *State v. Humpherys,* 134 Idaho 657, 660 (2000) (quoting *Houghland Farms, Inc. v. Johnson,* 119 Idaho 72, 77 (1990)). Mr. Fisher asserts that this Court's precedent holding that abolition of the insanity defense does not violate the Due Process Clause of the Fourteenth Amendment or the Eighth Amendment's prohibition against inflicting cruel and

[12] A fifth state, Nevada, enacted a statute abolishing the insanity defense, but it was ruled unconstitutional under the due process clauses of the Constitutions of the United States and Nevada. *See Finger v. State*, 27 P.3d 66 (Nev. 2001).

unusual punishment is manifestly wrong, and overruling that precedent is necessary to remedy continued injustice.

"In 1982, the Idaho Legislature repealed I.C. § 18–209 ('[m]ental disease or defect excluding responsibility as an affirmative defense') and enacted new language in I.C. § 18–207(a) to provide that '[m]ental condition shall not be a defense to criminal conduct,' which abolished the insanity defense in criminal cases." *Delling*, 152 Idaho at 124. In finding that the abolition of the insanity defense does not violate a defendant's constitutional rights, the *Delling* Court essentially held that no developments in the law since the Court first upheld the abolition of the insanity defense in *Searcy* in 1990 caused it to change its viewpoint.[13] *Id.* at 124-130. The *Delling* Court quoted extensively from *Searcy*, which provided three primary reasons for its finding of no due process violation:

> While the issue facing us today has never been directly decided by the United States Supreme Court, the language from several opinions of that Court suggests rather convincingly that that Court would conclude that the due process of the fifth amendment does not require the states to provide a criminal defendant with an independent defense of insanity. First, in *Leland v. Oregon,* 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), the United States Supreme Court rejected an argument that due process required the use of any particular insanity test and upheld an Oregon statute which placed on the criminal defendant the burden of proving his insanity defense, and then by proof beyond a reasonable doubt. In *Powell v. Texas,* 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), the Supreme Court stated:
>
> > [T]his court has never articulated a general constitutional doctrine of *mens rea.*
> >
> > We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The

[13] The *Delling* Court's legal analysis and conclusions are separated by headings addressing multiple constitutional arguments made by the defendant in that case. The substance of the Court's various analyses and conclusions appear interchangeably applicable to each of Mr. Fisher's Due Process and Eighth Amendment claims, and are addressed universally in this Brief.

> doctrines of *actus reus, mens rea,* insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. *This process of adjustment has always been thought to be the province of the States.*
>
> 392 U.S. at 535–536, 88 S.Ct. at 2156, 20 L.Ed.2d at 1269 (emphasis added). Justice Marshall, in his *Powell* opinion, stated that 'nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms.' 392 U.S. at 536, 88 S.Ct. at 2156 [20 L.Ed.2d at 1269]. Justice Rehnquist recently reaffirmed this view in his dissenting opinion in *Ake v. Oklahoma,* 470 U.S. 68, 91, 105 S.Ct. 1087, 1100, 84 L.Ed.2d 53, 71 (1985), in which he wrote:
>
> > [I]t is highly doubtful that due process requires a state to make available an insanity defense to a criminal defendant, but in any event if such a defense is afforded the burden of proving insanity can be placed on the defendant.

Delling, 152 Idaho at 128-29 (quoting *Searcy,* 118 Idaho at 636 (footnote omitted by Court)). This Court's continuing reliance upon these authorities is misplaced.

First, the *Leland* Court's holding that a state may, consistent with due process, require a defendant to prove his own insanity, and thus lack of moral culpability, beyond a reasonable doubt, says nothing about whether abolishing the insanity defense altogether violates due process. *See generally Leland*. *Leland* did not overturn the centuries old requirement that criminal liability and criminal punishment were only available to those who were morally culpable. *Id.* Requiring a defendant to prove beyond a reasonable doubt that, due to their insanity, they are not morally culpable for the otherwise criminal act they committed, is a far cry from a holding that the defendant's moral culpability is altogether irrelevant to criminal liability.

Next, the portions of the *Powell* Opinion relied upon by the *Searcy* Court are best described as dicta, as they were not necessary to the Court's holding that a statute criminalizing public intoxication does not violate the Eighth Amendment simply because the defendant believed he was "compelled" to drink due to his alcoholism. *See Powell v. Texas,* 392 U.S. 514,

531-35 (1968). Subsequent Supreme Court decisions recognize that the power of a State to adjust the "doctrines of *actus reus, mens rea,* insanity, mistake, justification, and duress" to changing times (*id.* at 535-36), is in fact limited by the Due Process Clause of the Fourteenth Amendment. Two years after *Powell*, the Supreme Court held that due process requires criminal convictions (or juvenile delinquency findings), to be based upon proof beyond a reasonable doubt, and not some lesser standard authorized by a state legislature. *See In re Winship*, 397 U.S. 358 (1970). The Supreme Court has also held that due process bars statutory presumptions that a defendant committed a criminal act with the required mental state. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975); *see also Sandstrom v. Montana*, 442 U.S. 510 (1979). Thus, the *Powell* dicta should not be read as a validation of the Idaho legislature's abolition of the insanity defense.

Finally, while Justice Rehnquist expressed his belief that it is "highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant," he did so without providing any analysis as to why. *See Ake v. Oklahoma,* 470 U.S. 68, 91 (1985) (Rehnquist, J. dissenting). On the contrary, Justice Breyer's expression that he would have granted certiorari to "consider whether Idaho's modification of the insanity defense is consistent with the Fourteenth Amendment's Due Process clause" was based upon his observation that "[t]he law has long recognized that criminal punishment is not appropriate for those who, by reason of insanity, cannot tell right from wrong," and that "[t]he insanity defense in nearly every State incorporates this principle." *Delling v. Idaho,* 133 S. Ct. 504, 505 (2012) (Breyer, J. dissenting from denial of Certiorari) (citations omitted). Though neither is binding, Justice Breyer's view is *at least* as compelling as Justice Rehnquist's, considering Justice Breyer's view is supported by historical precedent.

In finding that the insanity defense is not constitutionally required, the *Delling* Court found that Idaho law protects mentally ill individuals in three ways: First, I.C. § 18-210 protects "mentally incapacitated defendants" who are not competent to stand trial, from being convicted of crimes; second, I.C. 18-207(3) allows a defendant to put on evidence demonstrating that he was not able to form the requisite intent to commit the proscribed act due to his mental illness; and, third, I.C. § 19-2523 requires a sentencing court to consider a defendant's mental illness when determining an appropriate sentence. *Delling*, 152 Idaho at 128-131. None of these provisions saves Idaho's abolition of the insanity defense from Due Process and Eight Amendment challenges.

First, the United States Supreme Court has long recognized that individuals unable to assist in their own defense cannot be tried for their alleged crimes, until such time as their competence has been established or restored. *See Cooper v. Oklahoma*, 517 U.S. 348 (1996); *Dusky v. United States*, 362 U.S. 402 (1960). Abiding by United States Supreme Court precedent barring the prosecution of incompetent defendants does not protect individuals who are not morally culpable due to their mental illness, but who are otherwise competent to stand trial. The fact that Mr. Fisher could be medicated enough to enable him to assist in his own defense after fifteen months of treatment, does not make Mr. Fisher morally culpable for tragically acting upon his delusional belief that a "starter network" was going to kill him and his loved ones.

Second, the fact that Idaho allows a defendant to present evidence of mental illness to negate criminal intent does not ensure that only morally culpable defendants are held criminally liable. As noted in section I(B) above, only the morally culpable could be held criminally liable at common law, and moral culpability includes *both* a person's ability to form the intent to

commit a criminal act *and* the ability to appreciate the wrongfulness of the act. *See*, *e.g.*, 3 T. COOLEY, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, Book IV, p. 194 (3rd ED. Rev. 1884) ("lunatics or infants … are incapable of committing any crime: unless in such cases where they show a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil."). Allowing a defendant to present evidence negating criminal intent, but not allowing him to present evidence that he "cannot tell right from wrong," is insufficient to meet constitutional requirements. *Delling v. Idaho,* 133 S. Ct. 504 (2012) (Breyer, J. dissenting from denial of Certiorari).

Finally, the fact that Idaho law requires a sentencing court to consider a defendant's mental illness and the role it played in the defendant's crime only *after* he has been found guilty, does nothing to shield a person who is not morally culpable, due to their mental illness, from criminal liability in the first place. The consideration of moral culpability as a sentencing factor serves only to determine whether the punishment inflicted fits the crime committed. *See e.g.*, *Enmund v. Florida*, 458 U.S. 782 (1982) (finding that a defendant who aided and abetted in a robbery in which people were killed, but who did not kill or intend to kill, was less morally culpable than his co-defendants, and the imposition of the death penalty violated the Eighth Amendment). Considering mental illness only after a defendant has been deemed criminally liable does nothing to protect the defendant's due process rights.

Mr. Fisher acknowledges that Idaho law does not violate a mentally ill person's constitutional rights in every conceivable manner. However, the fact that Idaho law is consistent with United States Supreme Court precedent in some areas, does not inoculate Idaho's abolition of the insanity defense from constitutional challenge. A state system that would provide a criminal defendant with counsel, notice of the charges against them, and an opportunity to

defend themselves at a jury trial, would nevertheless be unconstitutional if that system required the defendant to be a witness against himself. A system that would impose criminal liability and criminal punishment upon a person who is not morally culpable due to their mental illness, does not become constitutional merely because that individual is provided with other constitutionally mandated protections.

The Due Process Clause of the Fourteenth Amendment and the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment bar the infliction of criminal liability and criminal punishment upon those who are not morally culpable for their actions due to their mental illness. Idaho's abolition of the insanity defense violates both of these constitutional provisions. This Court should overrule *Delling* and its predecessors and hold that Idaho's abolition of the insanity defense is unconstitutional.

II.

The District Court Abused Its Discretion By Executing A Fixed-Life Sentence Based Upon Its Uncertainty As To Whether Mr. Fisher Will Be Medication Compliant In The Future

A. Introduction

The district court imposed a fixed life sentence based entirely upon its inability to be certain that Mr. Fisher would be medication compliant, and therefore not a danger, in the future. While the Court's finding that Mr. Fisher poses a danger when un-medicated is a reasonable conclusion based upon the facts presented, it abused its discretion by imposing a fixed life sentence based upon its uncertainty as to whether Mr. Fisher will be medication compliant in the future.

B. The District Court Abused Its Discretion By Executing A Fixed-Life Sentence Based Upon Its Uncertainty As To Whether Mr. Fisher Will Be Medication Compliant In The Future

A sentence imposed within the statutory limits is reviewed under an abuse of discretion standard. *Delling*, 152 Idaho at 132 (citations omitted). "When considering whether the trial court abused its discretion, [the Appellate Court] considers: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of its discretion and consistently with the legal standards applicable; and (3) whether the trial court reached its decision by an exercise of reason." *Id.* (citations omitted).

"A fixed or determinate life sentence is a serious penalty, and should not be imposed lightly." *State v. Jackson*, 130 Idaho 293, 294 (1997). "[A] fixed life sentence is appropriate if necessary to protect society, to deter the individual and the public, if rehabilitation is unlikely, or if the behavior giving rise to the crime was so egregious that a determinate life sentence is necessary for proper punishment or retribution." *Id.* at 295. "[A] fixed life sentence should not be imposed as a hedge against uncertainty." *Id.*

After articulating the sentencing factors, including that retribution and risk to the public are the most important considerations, the court stated the following:

> Mr. Mohler-Kerns by all accounts was a good and decent man whose life was tragically ended as a result of Mr. Fisher's criminal conduct. And I need to make sure that the punishment I impose reflects the seriousness of that offense.
>
> Now, mental health, Mr. Fisher's mental health condition, is an important or significant factor in determining what sentence is appropriate to impose today. In those situations where mental illness is an important sentencing consideration, Idaho Code Section 19-2523 directs me to consider several factors in pronouncing sentence. One of those is the extent to which the defendant is mentally ill.
>
> We heard Dr. LaCroix testify today and all of the medical evidence I have reviewed up to this point is consistent with her conclusion that the defendant suffers from schizophrenia. Dr. LaCroix testified that this is a persistent condition

whose symptoms may be helped or reduced by appropriate pharmacological treatment, but they don't go away. They're not eliminated.

And Dr. LaCroix also testified of course that the defendant's schizophrenia was a major contributing factor to the incident at issue. The defendant's degree of illness or defect in his level of functional impairment is also a factor that I'm directed to consider, as is the prognosis for improvement or rehabilitation.

Now, we can see I think from the PSI materials that Mr. Fisher is, while being forcibly medicated, his symptoms have improved. He is not asymptomatic and therefore not as prone to the kind of behavior that brings us all here today when he is being forcibly medicated.

Another factor I'm to consider is the availability of treatment and the level of care required. Now, it appears from the testimony today that pharmacological treatment is an essential component to that treatment, that there are drugs available through injection presently that remain in the system and have an effect for a couple of weeks to a month.

I think it's also important to consider the fact that Mr. Fisher has a history of declining medication, and his symptoms improved in custody while he was being forcibly medicated, not because he was capable of recognizing or accepting the need to be medicated or wanting to be medicated.

So we have a circumstance in which Mr. Fisher, if left to his own devices, is I think rightly perceived as a risk to not be compliant with medication regimens and to slip back into the kind of condition he was in when he did the terrible thing he did.

The statute I mentioned also requires me to consider any risk of danger the defendant may create for the public if at large or the absence of that risk. It's clear that there is a profound danger that Mr. Fisher presents, at least in an unmedicated state.

And, finally, the statute indicates that I must consider the capacity of defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law at the time of the offense charged.

Now, here it appears that Mr. Fisher's criminal conduct at the time of the offense charged was prompted in large degree at least by a delusion that someone was out to get him or his family, and he drew the line at messing with his family, and he felt he had to take some kind of action.

Now, it's completely unclear why this kind of action was what he felt was necessary at the time or why Mr. Ellis or Matthew Mohler-Kerns were perceived

by the defendant at the time to present any kind of risk to him or to his family. They are, by any reasonable account of the events here, just simply perfectly innocent people who were just in the wrong place at the wrong time and were caught in the cross hairs of a paranoid delusion.

….

The randomness I think speaks to the level of danger that the defendant presents to the public. I'm searching I think for a reason to be confident that if Mr. Fisher were at large again at some point in the future, that he wouldn't return to the state of delusion and psychosis that prompted him to carry out the course of conduct he carried out on February 18, 2013.

It's very difficult, hearing what I've heard in court, reading what I've read, to achieve that kind of a comfort level. Now, the Mr. Fisher who sits here today, having been in custody for these 2-1/2 years and having been medicated for the better part of that, may well not be a profound risk to this state.

But if there is any slippage in his medication regimen, he does. He clearly does. And as Dr. LaCroix testified, one of the risk factors here is past violence, it being somewhat or having some predictive capacity with regard to future violence.

The defendant having done what he did, it's very difficult to achieve some kind of comfort level that he would never do anything like this again. And as I indicated, he does have a history of declining appropriate medication, being noncompliant with medication.

….

Were I inclined, based on the information available to me, to believe that there was a realistic prospect that Mr. Fisher could safely be returned to the future – to the public at some future point without a meaningful risk, that he would engage in some kind of violent conduct like this again in the future, the sentence I would impose today would be much different.

But I just can't get there comfort-level wise. I think Mr. Fisher and the risk he presents is a profound one.

(Tr. 9/30/15, p.111, L.12 – p.120, L.3.) The district court then pronounced its fixed life sentence. (Tr. 9/30/15, p.120, Ls.4-10.)

In summary, the district court concluded that Mr. Fisher's schizophrenia was a direct cause of these tragic events and recognized that, while medicated, Mr. Fisher is not likely to

engage in similar behavior; however, it found that it had to impose a fixed life sentence because it could not be sure that Mr. Fisher would be medication compliant in the future. Thus, the court's fixed life sentence was imposed as a hedge against its uncertainty and represents an abuse of discretion.

While the death of Mr. Mohler-Kerns is heart-breaking, Mr. Fisher's character and actions are not so egregious as to warrant a fixed life sentence. The district court recognized that Mr. Fisher had no prior history of violence, did not demonstrate a long history of criminal thinking, and was gainfully employed until his schizophrenia took control of him a short while before the killing. (Tr. 9/30/15, p.118, L.11 – p.119, L.9; *see also* PSI, pp.2-21.) Unlike other recent cases where the Idaho Supreme Court affirmed fixed life sentences for mentally ill individuals, Mr. Fisher was not obsessed with the idea of killing, did not pre-plan his actions, and the murder itself was not particularly gruesome. *See Delling*, 152 Idaho at 134; *see also State v. Windom*, 150 Idaho 873, 878-80 (2011). All of the evidence before the court suggests that Mr. Fisher's schizophrenia caused him to believe that his family was in danger, that Mr. Mohler-Kerns was a part of that danger, and that he shot and killed him in order to save his family.

The only "aggravating factor" the district court articulated was that "Mr. Mohler-Kerns was a good and decent man whose life was tragically ended as a result of Mr. Fisher's criminal conduct," but even that undoubtedly true observation would not have resulted in a fixed life sentence if the court could be sure that Mr. Fisher would not be a danger in the future. (Tr. 9/30/15, p.113, Ls.9-18; p.119, L.18 – p.120, L.3.) Two and one-half years after Mr. Ellis' assault, and Mr. Mohler-Kerns' death, a now medicated Shawn Fisher stated the following:

> I'm not expecting to ever be forgiven, but I would like to sincerely apologize for my actions on February 2013, to Ellis and the families of those that were affected the most, especially the Kerns family for their loss of their son.

> I wish I could turn back time, do everything over again. I know nothing can make things right no matter what I say or do. I'm deeply sorry for my negative actions on that night.

(Tr. 9/30/15, p.110, L.24 – p.111, L.9.) A medicated Shawn Fisher demonstrated insight into the wrongfulness of his conduct and the impact that it had on his victims and their families. There is no reason to believe that a medicated Shawn Fisher would pose a threat to public safety in the future.

The district court's concern that Mr. Fisher would not be medication compliant in the future, based upon the fact that he was not medication compliant in the past, is misguided. Mr. Fisher's prior refusal to take his medications coincided with his failure to recognize that he is schizophrenic, and that his beliefs, for example, that he has been resurrected twice and can astral project, are the delusional products of his illness. (PSI, pp.863-884.) There is nothing in the record to suggest that after at least seven and one-half additional years of understanding that he is schizophrenic and taking medications to help him control his delusions, Mr. Fisher would not be medication compliant. This is particularly true where Mr. Fisher's illness can be controlled with either monthly or bi-monthly injections that any future parole officer would undoubtedly be able to ensure he takes as a condition of his release. (Tr. 9/30/15, p.79, L.18 – p.82, L.5.)

The fixed life sentence imposed in this case is nothing more than a hedge against the district court's uncertainty that Mr. Fisher would be medication compliant in the future and is an abuse of the court's discretion. This Court should vacate Mr. Fisher's sentence and remand his case for a new sentencing hearing.

CONCLUSION

Mr. Fisher respectfully requests that this Court declare Idaho's abolition of the insanity defense unconstitutional, vacate his guilty plea and conviction, and remand his case for further proceedings. Alternatively, Mr. Fisher respectfully requests that this Court vacate his fixed life sentence and remand his case for a new sentencing hearing.

DATED this 13th day of July, 2016.

_____/s/_____
JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of July, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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DISTRICT JUDGE
E-MAILED BRIEF

ERIC R ROLFSEN
ADA COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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DEPUTY ATTORNEY GENERAL
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E-MAILED BRIEF

_____/s/_____
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JCP/eas